MOTION FILED DEC 27 1951

Supreme Court of the United States

OCTOBER TERM 1951

No. 115

ADELE WEISS,

Petitioner,

against

THE UNITED STATES OF AMERICA.

MOTION FOR LEAVE TO FILE AND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully moves for leave to file the annexed petition for rehearing of the order of this Court denying the petition for a Writ of Certiorari in this case, entered on October 8, 1951. Rehearing is sought at this time because, as is pointed out more fully in the annexed petition, the Government failed to state that there was an appeal pending in the Fifth Circuit involving the same state of facts as the above entitled case, which was decided December 14, 1951. Although this second petition for a rehearing is filed after the expiration of the time prescribed by Rule 33, the Court clearly has power, in its discretion, to entertain the petition. The jurisdiction of this Court is now invoked under 28 U. S. C. Section 452.

Dated, New York City, December 27, 1951.

SIDNEY MORSE,
Counsel for Petitioner.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner prays that this Court grant rehearing of its order of October 8, 1951, denying the petition for a writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals in the above entitled case, as prayed for in the petition of June 13, 1951.

Reasons for Granting a Rehearing and Issuing the Writ

The Government at page 5 of its brief cites the case of Parker v. United States, but failed to state the material fact that there was an appeal pending in the Fifth Circuit. This was material as it would show that there were three appeals involving the issues of the above case in different Circuits, and that this question involved herein is of National importance. The Fifth Circuit affirmed the judgment in favor of the Government on December 14, 1951.

Petitioner respectfully supplements her argument in support of question three * with the doctrine of **Helvering v. LeGierse,** 312 U. S. 531, and the doctrine of equality of risk.

Petitioner argues that where a class of veterans during their lifetime paid their contributive share of the liabilities that were charged to the National Service Life Insurance Fund, and paid the same contribution that was charged to all the other policyholders of the same age, class and equal expectation of life, they paid all the premiums required pursuant to the terms of a certificate of insurance issued on a mutual or participating basis.

Equality of Risk. "It is one of the fundamental principles in the apportionment of the cost in life insurance

* Petition, pages 8, 9.

that the same risks pay the same premium. * * * " (Handbook of Insurance, Crobaugh, page 97.)

Both the District Court and the Court below accurately stated the facts in their opinions. **If plaintiff's complaint does not state a claim, why did the Government find it necessary to misstate the facts in their brief?**

It is urgently stressed upon this Court that plaintiff's complaint is not based on dividends, as the Government stated in their brief, but rather as the Court below stated (R. 42):

> " * * * for the keeping in force of the insurance she relies upon (1) the existence of an insurance reserve based upon unearned premiums or undeclared dividends sufficient and effective for the purpose * * *."

At page 44, the Court below stated further:

> " * * * No dividends were, however, declared for many years. Indeed this delay in the declaration of dividends is made one of the grounds of complaint by the plaintiff. * * * "

The Court below further stated (R. 44, 45):

> " * * * she is not relying upon declared and accumulated dividends, but rather upon the Administrator's breach of duty in failing to declare dividends. Her contention is that there had been built up in the National Service Life Insurance Fund a reserve on these certificates on the basis of premiums paid in which, not having been declared as dividends, must now be treated as applicable upon these certificates to render them fully paid up policies for a period beyond the time of the death of the insured. * * * "

The complaint herein was dismissed for failure to state a claim. **The Court below affirmed the order of the District Court denying plaintiff's motion for leave to amend** (R. 42, 36, 37). Plaintiff is one of a large class of beneficiaries that fall within the aforementioned state of facts. If plaintiff cannot have her day in Court, won't this Court please grant her any one of the following remedies:

1. **Leave to serve an amended complaint** (Rule 15).
2. Leave to examine an Actuary in the employ of the defendant before trial (Rule 30).
3. Request to answer interrogatories (Rule 26a).
4. Requests for admissions (Rule 36).

Plaintiff maintains that the foregoing class of deceased veterans during their lifetime paid the same premiums that the other policyholders of the same age, class and equal expectation of life paid,* and if she is given any one of the foregoing remedies she can prove her case without a trial.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Second Circuit.

Respectfully submitted,

SIDNEY MORSE,
Counsel for Petitioner.

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and is restricted to grounds specified in Rule 33 of the Rules of this Court.

SIDNEY MORSE,
Counsel for Petitioner.

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* Petition, pages 8, 9.

Encl